



PUBLIC NOTICE

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COMMENT SOUGHT ON DRAFT PROGRAM COMMENT TO GOVERN REVIEW OF POSITIVE TRAIN CONTROL FACILITIES UNDER SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

WT Docket No. 13-240

Comment Date: February 12, 2014

By this Public Notice, the Wireless Telecommunications Bureau (Bureau) seeks public comment on the attached draft Program Comment (Attachment A) to govern review of Positive Train Control (PTC) wayside facilities under Section 106 of the National Historic Preservation Act (NHPA).¹ For the reader's convenience, a summary of substantive provisions of the draft Program Comment is also appended as Attachment B. The intent of this Program Comment is to tailor and expedite the Tribal and historic preservation review process under Section 106 of the National Historic Preservation Act (NHPA) for the Congressionally-mandated PTC rail safety communications initiative. PTC is designed to save lives and enhance safety and security along the nation's railroad lines by use of wireless communications technology.

On September 27, 2013, the Bureau first invited comment regarding the development of a PTC Program Comment through release of a Public Notice and Scoping Document.² The Bureau is continuing the process of developing a Program Comment, and seeks comment regarding the attached draft, which has been designed specifically for PTC communications structures and facilities.

Under the rules of the Advisory Council on Historic Preservation (ACHP), a Federal agency may request that the ACHP issue a Program Comment to govern Section 106 review of a category of undertakings in lieu of procedures specified in the ACHP's rules.³ Prior to requesting a Program Comment, the agency shall arrange for public participation appropriate to the subject matter and the scope of the category.⁴ This Public Notice is issued in partial fulfillment of this public participation

¹ 16 U.S.C. § 470f.

² See *Comment Sought On Scoping Document For Development Of A Proposed Program Comment To Govern Review Of Positive Train Control Facilities Under Section 106 Of The National Historic Preservation Act*, Public Notice, WT Docket No. 13-240, 28 FCC Rcd 13852 (2013) (*Scoping Document Public Notice*). On the same date, the Bureau and the Office of Native Affairs and Policy also released a separate Public Notice and Scoping Document to initiate government-to-government consultation on the proposed Program Comment with Federally recognized Tribal Nations. See *CGB's Office of Native Affairs and Policy and WTB Release Scoping Document to Initiate Tribal Consultation on a Proposed Program Comment to Govern Review of Positive Train Control Facilities Under Section 106 of the National Historic Preservation Act*, Public Notice, WT Docket No. 13-240, 28 FCC Rcd 13870 (2013).

³ See 36 C.F.R. § 800.14(e).

⁴ *Id.* § 800.14(e)(2).

requirement, as well as to further the Commission's ongoing consultation with State Historic Preservation Officers, Tribal Historic Preservation Officers, and Tribal Nations.⁵ After considering the comments received in response to this Public Notice and otherwise completing its consultation obligations, the Bureau expects to submit a proposed Program Comment to the ACHP. The ACHP will then have 45 days to issue a Program Comment, unless it requests additional documentation, declines to comment, or obtains the Commission's consent to extend this period of time.⁶

This proceeding continues to be treated as exempt under the Commission's *ex parte* rules.⁷ Accordingly, parties do not need to submit *ex parte* filings for communications concerning the development of the Program Comment.

Filing instructions: Interested parties may file comments on or before the date indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS").

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper should file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers should submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

Availability of Documents: Comments will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. <http://fjallfoss.fcc.gov/ecfs2/> Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

⁵ *Id.* § 800.14(e)(3), (4).

⁶ *Id.* § 800.14(e)(5).

⁷ *Scoping Document Public Notice*, 28 FCC Rcd at 13853. 47 C.F.R. § 1.1204; *see* 47 C.F.R. § 1.1200(a) ("Where the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable *ex parte* rules by order, letter, or public notice.").

Accessibility information: To request information in accessible formats (computer diskettes large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530(voice), (202) 418-0432(TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at www.fcc.gov .

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ATTACHMENT A

Draft Program Comment to Tailor the Federal Communications Commission's Section 106 Review for Undertakings Involving the Construction of Positive Train Control Wayside Facilities

I. Introduction

The Federal Communications Commission (FCC) licenses and registers communications facilities that require review and consultation pursuant to Section 106 of the National Historic Preservation Act (Section 106), 16 U.S.C. 470f, to assess whether the proposed facility may have an adverse effect on historic properties. The regulations implementing Section 106, developed by the Advisory Council on Historic Preservation (Council) and codified at 36 CFR Pt 800, describe the procedures Federal agencies must follow to meet this obligation. Alternate compliance procedures, provided for under the Section 106 regulations, allow agencies to meet these Section 106 obligations using a process that is tailored to their mission and needs. Under 36 CFR § 800.14(e), an agency may request a "Program Comment" from the Council in lieu of case-by-case review. The benefit of a Program Comment is that it allows a Federal agency to comply with Section 106 in an efficient and targeted manner for a specific category of undertakings.

At the FCC's request, the Council issues the following Program Comment in accordance with 36 CFR § 800.14(e) in order to establish a tailored process for consideration, under Section 106, of the effects of wayside poles constructed by the Nation's freight and passenger railroads to deploy Positive Train Control (PTC) systems.⁸ In lieu of the process set forth in subpart B of the Council's regulations, the FCC currently conducts Section 106 review of wireless tower and antenna undertakings in accordance with the Council's procedures, 36 C.F.R. Pt 800, as modified and supplemented by two Nationwide Programmatic Agreements (NPAs) negotiated and executed in accordance with 36 CFR § 800.14(b). These Nationwide Programmatic Agreements are codified in the FCC's rules at 47 CFR Pt 1, Apps. B (Nationwide Collocation Agreement) and C (FCC NPA).

This Program Comment provides an optional alternative process to certain procedures set forth in the Nationwide Programmatic Agreements for the category of undertakings covered herein. Applicants electing not to utilize the alternate procedures specified herein for undertakings covered by the Program Comment will be subject to the applicable procedures set forth in the Nationwide Programmatic Agreements. Applicants that elect to utilize this Program Comment must continue to follow the Council's procedures, as modified or supplemented by the NPAs, to the extent the Program Comment does not establish alternative procedures.

Consistent with FCC NPA Section IV.K, nothing in this Program Comment shall be construed to prohibit or limit railroads and Tribal Nations from entering into arrangements or agreements governing their contacts, including review of proposed facilities, provided such arrangements or agreements are otherwise consistent with Federal law and no modification is made in the roles of other parties to the Section 106 process without the other parties' consent. Documentation of such alternative arrangements or agreements should be filed with the FCC's Federal Preservation Officer. All communications from railroads to Tribal Nations shall be made in a manner that is respectful of Tribal sovereignty. In addition, this Program Comment shall not be construed to limit State Historic Preservation Officers' (SHPOs') authority to adopt flexible procedures under Section III.F or other provisions of the FCC NPA.

⁸ In general terms, a wayside pole consists of a metal pole largely resembling a utility pole, with an associated equipment cabinet, used for mounting antennas along the way of the railroad track.

This Program Comment does not waive Section 106 compliance for any category of undertakings, nor does it waive requirements to consult with Federally recognized Tribal Nations under Section 101(d)(6) of the National Historic Preservation Act (NHPA) or any other source of law. The obligation to consult on a government-to-government basis with Tribal Nations pursuant to the Federal government's trust responsibility rests with the FCC as a Federal agency and cannot be delegated to any party.

II. Background

PTC system implementation is a complex undertaking reaching almost every element of affected railroad operations. PTC systems generally use radio signals between trains and a land-based network to prevent certain railroad accidents. When installed, PTC systems will be capable of controlling or stopping a train when a train operator is unavailable or unresponsive and action is required to avoid a derailment, incursion into a work zone, certain train-to-train collisions, or movement through a switch left in the wrong position.⁹

In response to a 2008 railroad accident in Chatsworth, California that claimed 25 lives and caused over 100 injuries, Congress enacted the Rail Safety Improvement Act of 2008 (P.L. 110-432) (RSIA) that requires freight and passenger railroads to deploy interoperable PTC systems by December 31, 2015. More specifically, RSIA requires PTC system implementation on all Class I railroad lines that carry poison- or toxic-by-inhalation hazardous (PIH or TIH) materials and five million gross tons or more of annual traffic, and on any railroad's main line tracks over which intercity or commuter rail passenger train service is regularly provided. In addition, RSIA provides the Federal Railroad Administration (FRA) with the authority to require PTC system implementation on any other line.

According to FRA, railroads required to implement PTC must do so on over 60,000 of approximately 160,000 miles of track nationwide. In addition, FRA has reported that railroads must design, produce, and install more than 20 major PTC components, such as data radios for locomotive communication, locomotive management computers, and back office servers as part of the PTC implementation. FRA promulgated regulations to implement the requirements of RSIA. The regulations do not require the railroads to use a specific technology or install a specific type of infrastructure as long as the system is designed to meet certain performance objectives.

The components necessary to implement PTC systems include more than 20,000 poles, known as "wayside poles," to support fixed wireless antennas within the existing railroad right-of-way alongside existing tracks nationwide. While the precise system architecture will vary somewhat depending on topography, the railroad's existing communications systems, and other factors, most of the major railroads intend generally to install wayside poles approximately one to three miles apart along their tracks and at certain switch points and other operational sites. Nearly all of the wayside poles are expected to be between 25 and 65 feet in height, including the antenna, although in some instances the antenna may bring the total height to slightly more than 65 feet. The poles' foundations will generally vary from 5 to 10 feet or in some instances up to 15 feet in depth, depending on site conditions, and from 12 to 15 inches in diameter. The railroads have planned generally to install the foundations either by screwing the shaft directly into the ground or by auger drilling a hole the size of the shaft. However,

⁹ Deborah Hersman, Chairman of the National Transportation Safety Board (NTSB), has stated that while railroad crashes occur for a variety of reasons, the "biggest safety challenge" is human error, and "although human error cannot be eradicated, PTC technology is capable of supplementing the human operation of trains." (Source: Testimony of the Honorable Deborah Hersman, NTSB Chairman, before the Senate Commerce Committee, June 19, 2013). In fact, the NTSB estimates that each of the 16 railroad crashes it has investigated since 2005 could have been "prevented or mitigated" with PTC systems.

some railroads have stated that they can use hand excavation methods where necessary in order to assist in ascertaining the presence of archeological resources.

In addition to wayside poles, the railroads will need to install an estimated 3,000 to 4,000 additional antennas to serve as base stations. These base stations will in most instances be located farther away from the track and at greater heights above ground level, often 100 to 150 feet. While some of the base station antennas will require new tower construction, the railroads have predicted that the majority will be collocated on existing structures. Except in the limited instances where they fall within the criteria set forth in Section III of this Program Comment, the Program Comment does not apply to Section 106 review of base station construction.

The FCC has determined that the construction of PTC transmission facilities and their supporting structures is a Federal undertaking under Section 106. These facilities transmit signals using radio spectrum that has been licensed (or in limited instances will be licensed) to the railroads or their affiliates by the FCC. Pursuant to sections 1.1307 and 1.1312 of the FCC's rules, 47 CFR §§ 1.1307, 1.1312, the railroads are required to ascertain prior to construction the environmental impacts of facilities constructed to transmit signals under these licenses, including Section 106 review under the relevant procedures set forth by the Council and the FCC.

According to the FRA, "PTC implementation, on the scale required by the RSIA, has never been attempted anywhere in the world."¹⁰ The NTSB included PTC systems on its "Most Wanted list" every year from the list's inception in 1990 until the enactment of RSIA in 2008, and has added it again in 2014.¹¹ The NTSB remains concerned that more fatalities, injuries, and community evacuations due to hazardous materials releases are likely until PTC systems are implemented.¹² An August 2013 report issued by the Government Accountability Office (GAO) concluded that there are significant obstacles to PTC deployment and there is significant risk that PTC will not be installed by the statutory deadline.¹³ In light of the public safety objectives of RSIA, and in recognition of the unique challenges posed by the rapid deployment of PTC technology on a national scale, the FCC has requested that the Council endorse special procedures that are tailored to PTC wayside poles. Accordingly, this Program Comment is intended to create an efficient, practical, and timely review process that ensures full consideration of the effects of PTC wayside poles on historic properties, including sites of religious and cultural significance to Tribal Nations, in a manner that allows the railroads to complete construction by the Congressional deadline.

In developing the Program Comment, the FCC consulted with the Council, SHPOs, Tribal Historic Preservation Officers (THPOs) and other Tribal cultural preservation officials, and representatives of Federally recognized Tribal Nations. This consultation included government-to-government consultation with Tribal Nations in accordance with 36 CFR §§ 800.14(a)(1) and 800.14(f). The FCC also solicited public participation in accordance with 36 CFR §§ 800.14(a)(1) and 800.14(e)(2).¹⁴ Because PTC is not

¹⁰ "Positive Train Control Implementation Status, Issues, and Impacts," Federal Railroad Administration Report to Congress, at 2 (Aug. 2012), www.fra.dot.gov/Elib/Document/2318.

¹¹ Letter from Deborah A. P. Hersman, Chairman, National Transportation Safety Board, to Tom Wheeler, Chairman, Federal Communications Commission, WT Docket No. 13-240, at 2 (Nov. 19, 2013). See <http://www.nts.gov/safety/mwl.html>.

¹² *Id.*

¹³ See "Positive Train Control: Additional Authorities Could Benefit Implementation." GAO-13-720 (Aug. 16, 2013), <http://www.gao.gov/products/GAO-13-720>.

¹⁴ See, e.g., <https://www.fcc.gov/document/input-sought-program-comment-positive-train-control-infrastructure>, <http://www.fcc.gov/document/erratum-input-sought-program-comment-positive-train-control>, and <https://www.fcc.gov/document/ptc-program-comments>.

required to be deployed in Hawaii, no consultation with Native Hawaiian organizations was necessary. The FCC's efforts included, among other things, solicitation of comments on a Section 106 scoping document that was published in the *Federal Register*¹⁵ as well as sent specifically to leaders and cultural preservation officials of Tribal Nations, SHPOs, and other stakeholders; face-to-face meetings and teleconferences with THPOs and other Tribal preservation officials in various parts of the Nation, including both consultation meetings and demonstrations by the railroads; teleconferences with the SHPOs; and solicitation of Tribal, Federal agency, and other stakeholder views on a draft Program Comment. The FCC has documented in detail for the Council its consultation and public participation efforts as well as its consideration and disposition of views that it received during these processes **[to be provided with formal submission to ACHP]**. In addition, written comments are available for viewing through the FCC's Electronic Comment Filing System in Docket No. 13-240.¹⁶

III. Applicability

This Program Comment applies to wayside infrastructure that will be constructed within existing railroad rights-of-way for use in the implementation and operation of PTC systems. Infrastructure eligible for the procedures of the Program Comment may support either wayside antennas or base stations, but must not be taller than 75 feet (including antenna), create a foundation hole in excess of 15 inches in diameter (unless agreed to in the context of manual excavation), require a foundation deeper than 15 feet, or be situated outside the railroad right-of-way. In all other cases, including collocations, Section 106 review will be conducted under the existing FCC regulations and procedures.

This Program Comment may be adopted by any Federal agency, with notice to the Council and the FCC, to satisfy its obligations under Section 106 with respect to PTC installations within the scope of this Program Comment.

This Program Comment does not apply on "tribal lands," as defined under 36 CFR § 800.16(x), unless a Tribal Nation elects to adopt its provisions and in so doing follows the process set forth in Section I.D of the FCC NPA.

IV. Exclusions

The exclusions in the NPAs continue to apply to PTC infrastructure that falls within the terms of those exclusions, including any geographic areas that a SHPO may designate as excluded from review under Section III.F or VI.B of the FCC NPA. In addition, the following exclusions are appropriate for PTC wayside poles beyond those specified in the NPAs.

1. *Exclusion for Certain Structures Within Existing Railroad Right-of-Way.* Section III.E of the FCC NPA excludes from Section 106 review, subject to certain conditions, facilities to be constructed in or within 50 feet of a right-of-way designated for the location of communications towers or above-ground utility transmission or distribution lines and in active use for such purposes. Although not typically designated as communications or utility rights-of-way, railroad rights-of-way are functionally equivalent to communications or utility rights-of-way, and sometimes contain existing structures similar to utility or communications poles. Accordingly, PTC wayside structures that are installed within existing railroad rights-of-way and are similar to

¹⁵ 78 FR 65308 (Oct. 31, 2013) available at <http://www.gpo.gov/fdsys/pkg/FR-2013-10-31/pdf/2013-26000.pdf>.

¹⁶ <http://apps.fcc.gov/ecfs/>.

structures that already exist in the same vicinity within the right-of-way can be conditionally excluded from Section 106 review. The PTC wayside structures subject to this exclusion are those that would not constitute a substantial increase in size (as defined under elements 1-3 of the definition in the Nationwide Collocation Agreement, including no more than the standard number of one new equipment cabinet per wayside pole) over existing poles or similar structures (used for whatever purpose) located in the railroad right-of-way within the vicinity, provided they will not be located within the boundaries of a historic property as identified by the applicant in preparing the submission packet for Tribal Nations described in the Appendix. Thus, a SHPO will review structures that are otherwise eligible for this exclusion only when the applicant identifies a known historic property that encompasses the proposed location. Similar to the existing exclusion for communications and utility rights-of-way, covered facilities remain subject to the process for participation of Tribal Nations described herein, which is based on Section IV of the FCC NPA.

2. *Exclusion from Review for Effects on Railroad Track and Track Beds.* In addition, the FCC and its applicants may exclude from Section 106 review the effects of PTC facilities covered by this Program Comment on the rails or the track bed themselves. Wayside poles covered by this Program Comment are unlikely to have significant or adverse effects upon such nearby track and track beds. The FCC and its applicants must consider the effects of proposed PTC wayside facilities upon any railroad-related property types other than the rails and the track bed within the APE that are individually listed or have been determined eligible for listing on the National Register of Historic Places (National Register) under Section IV.D.1.a of the FCC NPA or that have been identified as contributing elements to a historic district, as well as any other historic properties, including properties of traditional cultural and religious significance to Tribal Nations and archeological resources underneath the track bed, within the APE.

V. Enhanced Submission Process

Because of the large number of wayside poles that must be installed before the December 31, 2015, statutory deadline, the following efficiencies will assist the SHPOs, Tribal Nations, and other stakeholders as they work with the FCC to complete quickly the Section 106 process.

1. *TCNS and E106.* The FCC uses two electronic systems to communicate with Tribal Nations and with SHPOs. The Tower Construction Notification System (TCNS) and the E106 System were developed as single-project data systems. TCNS is used to notify Tribal Nations of proposed projects and E106 is used to transmit documentation to the SHPOs and other consulting parties that register with the E106 system.

TCNS uses geographic areas of interest provided by each Tribal Nation, typically by county, to notify the appropriate Tribal Nations of proposed tower projects. After an applicant submits the location and other characteristics of a proposed antenna structure into TCNS, TCNS generates a letter to Tribal Nations that have indicated an interest in the location where the antenna structure would be located. TCNS also informs the applicant as to which Tribal Nations have received this letter. The Tribal Nations may then use TCNS to respond regarding their interest in a site. TCNS

is a secure system that protects the confidentiality of both applicants' and Tribal Nations' information from third parties.

Unless another method of communication and information sharing is agreed to by a Tribal Nation or Nations, with notice to the FCC as described in Section I of this Program Comment, railroads shall use TCNS for their proposed wayside poles in order to utilize the alternative Section 106 procedures specified in this Program Comment. If a Tribal Nation and a railroad have agreed to an alternative communication and information sharing process, the railroad shall inform the FCC of such agreement and keep FCC staff apprised of ongoing communications with all Tribal Nations through such an alternative arrangement. To achieve efficiencies in SHPO review and to facilitate FCC participation in the review process where necessary, the railroads shall also use E106 for all facilities subject to this Program Comment, except for proposed facilities that are exempt from SHPO review under either the FCC NPA or Section IV of this Program Comment. In the event a SHPO does not accept submissions through E106, the railroad shall submit FCC Form 620 or 621 by the means the SHPO prefers in addition to entering the information into E106. Use of E106 does not relieve an applicant of its obligation to provide notices and other documentation to consulting parties that are not registered with the E106 system under Section V.G of the FCC NPA, nor of its obligation to provide notice to local governments, the public, and any other groups the SHPO may designate under Sections V.A, V.B, and V.D of the FCC NPA.

2. *Batching of Submissions.* To reduce repetitive submissions and paperwork for all parties, the FCC has determined that it may be efficient for applicants using this Program Comment to batch information on PTC wayside infrastructure into single TCNS and E106 submissions for multiple installations within the same county. These efficiencies should be balanced against any difficulties in tracking and responding separately for multiple installations within a single submission. The FCC has discretion to permit or require batching as it may determine to be appropriate in the light of experience, and it shall provide all parties to the Section 106 process with guidance as to what batching is required or permitted. Any batching of submissions is for administrative convenience and is not intended to affect the level of review.

In the event Section 106 review is completed for some but not all wayside poles within a batched submission, the wayside poles for which review has been completed may be constructed without awaiting completion of the review process for the remaining wayside poles, provided the applicant has satisfied all other FCC regulatory requirements.

3. *Reports and Maps.* Ordinarily, applicants are not required to provide reports or maps as part of their TCNS submissions. Nevertheless, Tribal Nations often request a cultural resource report upon receipt of an application via TCNS. To avoid delay in achieving the statutorily mandated public safety benefits of PTC, and in recognition that the large number of PTC wayside poles will impose unusual strains on Tribal Nations in reviewing proposed constructions, applicants using this Program Comment must submit a cultural resources report, prepared by a professional who meets the relevant standards in *The Secretary of the Interior's Professional Qualifications Standards*. The contents of this report are identified in the Appendix to this Program Comment. Except where all poles in an application are exempt from SHPO review, applicants shall also provide this report to the SHPO as part of their E106 submissions.

Further, maps are an important part of the Section 106 process as they enable the reviewer to locate the proposed undertaking in the context of its landscape. Although U.S. Geological Survey maps are sufficient for many individual tower projects, in the context of a batched submission,

effective, expeditious review will typically require a more interactive view of the overall railroad right-of-way covered as well as the individual installations. Accordingly, batched submissions under this Program Comment shall include a Google Earth overlay map as specified in the Appendix.

Batched submissions in E106 shall include the information required on FCC Form 620 or 621 for each pole that is included in the batch. This information may be presented in a summary manner if it is the same for multiple poles. A batched E106 submission shall also include a Google Earth overlay map as specified in the Appendix.

In addition to the materials listed in the Appendix, applicants may also want to include a field survey and/or an ethnographic survey undertaken by an individual with the appropriate professional qualifications as detailed in *The Secretary of the Interior's Professional Qualifications Standards*. Although, consistent with Section VI.D.2 of the FCC NPA, a field survey is not routinely required, applicants are encouraged to address anticipated needs of SHPOs or Tribal Nations for field survey information in the early stages of the Section 106 process, consistent with Council rules requiring that Tribal consultation commence early in the planning process (36 CFR § 800.2(c)(2)(ii)(A)). This may include where appropriate arranging for the presence of one or more qualified representatives of Tribal Nations to be present during field work in a manner consistent with rail safety.

Some Tribal Nations also commonly request ethnographic surveys. An ethnographic survey is a literature search that provides, for instance, information on the migration or other movement patterns of Tribal Nations and their use of their ancestral territory. Applicants are encouraged to consider including ethnographic surveys with their TCNS submissions where they anticipate such surveys may be requested. To promote efficiency, applicants are further encouraged to engage the Tribal Nations regarding preparation of ethnographic surveys on a regional or multi-Tribal basis. In the event an applicant does not include an ethnographic survey in its TCNS submission and a Tribal Nation later requests an ethnographic survey, the matter shall be resolved in accordance with the procedures specified in Section V.6 of this Program Comment.

4. *Area of Potential Effects (APE)*. Given that all structures subject to this Program Comment will be 75 feet or less in height and narrow in profile, the ½-mile presumed APE for visual effects specified in the FCC NPA for towers less than 200 feet is reduced to ¼ mile for installations covered by this Program Comment. While we recommend that the APE be measured in a linear manner along the entire segment of track in order to avoid delay should relocation need to be explored, railroads may elect to measure the APE using a radius from each point. If a linear APE is used, it should extend ¼ mile from each edge of the right-of-way to ensure that it encompasses a ¼-mile radius from every pole site.

An alternative APE may be established where appropriate in accordance with the procedures specified in Section VI.C.5-6 of the FCC NPA. For example, a SHPO may propose a larger APE in rural or pristine settings.

5. *Compensation for Professional Services.* The Council has stated that a Tribal cultural resource office is justified in requesting payment for its services when an agency or applicant “essentially asks the tribe to fulfill the role of a consultant or contractor” by providing “specific information and documentation regarding the location, nature, and condition of individual sites” or by conducting a survey, in order “to identify historic properties that may be significant to an Indian tribe.” Memorandum from John M. Fowler, Executive Director, ACHP (July 6, 2001).

Consistent with this directive, Tribal Nations may seek recovery of expenses necessary to complete their review of PTC facility locations. Given the extraordinary burden that reviewing PTC facilities in an expedited fashion in addition to their other ongoing work may impose on Tribal cultural resource staff, such expenses may include those necessary to retain additional human resources in order to process the railroads’ submissions. Activities necessary to identify historic properties significant to a Tribal Nation may also include monitoring of construction by a Tribal representative. Accordingly, where a Tribal cultural resource office requests to monitor construction at a proposed site, the applicant is expected to accommodate such request in a manner consistent with rail safety and to meet any reasonable request for associated compensation and reimbursement of expenses.

The FCC encourages Tribal cultural resource offices to set their compensation according to a uniform schedule available to the railroads at levels commensurate with their expenses and efforts incurred in connection with the projects subject to this Program Comment. Tribal cultural resource offices and applicants may also enter into arrangements to establish the appropriate fees.

6. *Timeframes.* Given the unique public safety considerations and statutory deadline for PTC system implementation, this Program Comment modifies and adds definition to the FCC’s usual timeframes for project review by Tribal Nations.

Specifically, after an applicant submits the required enhanced documentation through TCNS as described above, Tribal Nations will have a total of approximately 40 days, subject to the procedures specified below, in which to identify any wayside poles within a batched submission that may merit further review or closer examination. A Tribal Nation may also notify the applicant and the FCC within this time period that it requires further information or materials to process the submission, again subject to the procedures specified below. This expedited review is made possible by the enhanced TCNS submission package, which should reduce the need for Tribal Nations to request additional information, as well as by the expectation that applicants will compensate Tribal Nations for the cost of retaining qualified personnel to perform the reviews. In addition, the railroads’ support for Tribal monitoring of construction may reduce the need for detailed pre-construction review.

If a Tribal Nation does not respond to a TCNS submission covered by this Program Comment within 20 days, and if the applicant has attempted at least one follow-up contact in a manner respectful of Tribal sovereignty during this 20-day period (including an inquiry as to whether the Tribal Nation requires additional information), the applicant may ask the FCC to send a letter and/or e-mail to the Tribal Nation’s designated cultural resources representative seeking a response. The FCC will send this letter or e-mail within five business days. If the Tribal Nation

does not respond within 15 days of the FCC's letter and/or e-mail, which the FCC will supplement with an attempted telephone contact unless the Tribal Nation has requested not to be contacted by telephone, it will be deemed to have no interest in review of the proposed facility. This is substantially the same process that the FCC follows for other submissions in TCNS, except that the time periods are shortened. For those Tribal Nations that have notified the FCC that they may generally be considered uninterested in TCNS submissions if they do not respond within a specific time period of 30 days or less, without any need for follow-up contact, the usual process applicable to those Tribal Nations shall apply.

Where a Tribal Nation requests additional information or materials, including compensation for professional services, at any time during the response period, the applicant and the Tribal Nation will attempt to resolve any disputes regarding the request within 15 days. If the matter is not resolved within 15 days, the parties may bring their disagreement before the FCC. Unless expressly authorized by the FCC, the applicant shall not proceed without satisfying the Tribal Nation's request. If the Tribal Nation does not respond as to its interest within 20 days after receiving requested additional information or materials, the applicant may request that the FCC give the Tribal Nation a final opportunity to express its interest. The applicant shall provide the FCC with a brief narrative of events and a copy of the materials it provided to the Tribal Nation. Except as described above, in no instance shall an applicant consider a Tribal Nation to have no interest in a proposed construction without either the Tribal Nation's agreement or express authorization from the FCC.

The FCC shall consider any request by a Tribal Nation for additional time to review an application in the context of the circumstances surrounding such a request.

As part of its response to a submission through TCNS, a Tribal Nation may request to monitor construction at any or all sites within a batched submission. Where necessary to ascertain the presence of archeological resources, a Tribal Nation may also request use of an excavation method other than screwing in of the pole or auger drilling. The applicant shall honor such requests as discussed above.

Where a Tribal Nation has identified sites within a batched submission as needing further review or a closer examination for effects on a historic property or cultural resource, or any other issue arises that cannot be resolved swiftly by the parties, the Tribal Nation and the railroad are encouraged promptly to bring the matter to the attention of the FCC. The FCC on a priority basis will initiate dialogue among the parties, and consultation with the Tribal Nation as appropriate, in order to resolve the concern. The FCC will resolve all such matters within 60 days of their being brought to its attention, unless the FCC determines that additional time is necessary. The FCC has full discretion to intervene in Section 106 review at any point in the process.

SHPO review periods and procedures continue to be governed by Section VII of the FCC NPA.

7. *Other Federal Agency Involvement.* Contemporaneously with or before submitting FCC Form 620 or 621 to the SHPO, applicants shall invite comment from any Federal agency with jurisdiction over land or historic properties within the APE of any proposed PTC wayside structure within a submission. Federal agencies shall respond to such requests within 30 days or

will be deemed to have no interest. Applicants are not required to invite Federal agency comment on a proposed structure that is exempt from SHPO review.

Consistent with Section VII.D.3 of the FCC NPA, where a proposed structure would have an adverse effect on a National Historic Landmark, the FCC shall request the Council to participate in consultation and shall invite participation by the Secretary of the Interior.

VI. Addressing Adverse Effects to Historic Properties

The Section 106 process requires that effects to historic properties be considered before construction. The Section 106 process does not prevent projects from being completed simply because there will be adverse effects to historic properties. If an adverse effect to a historic property cannot be avoided, then measures must be taken to minimize or mitigate the adverse effect.

In general, the process for addressing adverse effects of construction covered under this Program Comment shall be governed by Section VII.D of the FCC NPA. The following paragraphs offer additional guidance specific to PTC wayside structures.

1. *Avoidance.* Whenever possible, the preferred method to avoid adverse effects is to move or alter the project. Given the functional requirements of PTC, wayside poles cannot be moved outside the railroad right-of-way. In some instances, it may be possible to move a pole location along the track a sufficient distance to avoid adverse effects. However, depending on a number of factors, including topography, distance from other wayside poles, and relation to switches or other railroad equipment, the flexibility for such relocation may be very limited.
2. *Minimization.* Minimization is the preferred method to address adverse effects when relocation or other avoidance measures are not possible. Although applicants rarely will be able to reduce the height of PTC structures, they may find it possible to minimize the effects of ground disturbance in certain circumstances, for example by hand excavation of the site.
3. *Mitigation.* Mitigation measures are steps or actions that are taken to mitigate or lessen the adverse effects of an undertaking on historic properties. The mitigation measure must be related to the historic property that is affected. To the extent an adverse effect extends across multiple PTC sites, a single mitigation plan covering all of these sites may often be efficient. Among mitigation measures adopted in the past for other FCC undertakings have been cultural resource reports, nominations to the National Register of Historic Places, brochures, signage, and training programs and public presentations. For historic properties with an archeological component, mitigation typically involves data recovery measures.

VII. Previously Constructed Facilities

The railroads have acknowledged that prior to contacting the FCC about their PTC infrastructure buildout, they constructed many PTC facilities without completing Section 106 review. Section 106

review clearly should have been completed prior to construction, and it is important to the integrity of the Section 106 process that the effects of this construction be considered and addressed. Accordingly, the FCC will expeditiously establish a process for addressing PTC facilities that were constructed without Section 106 review, which will take into account Section 110(k) of the National Historic Preservation Act. Such process shall be consistent with Section X of the FCC NPA. In order to benefit from the efficiencies in this Program Comment, each railroad must provide complete responses to all information requests from the FCC regarding constructed PTC facilities within the timeframes established by the FCC. The process for addressing constructed PTC facilities will include appropriate mitigation by the railroads for the effects of premature construction, supported by all necessary financial commitments, and may include programmatic mitigation. In developing and implementing a mitigation process, the FCC shall involve the SHPOs and Tribal Nations.

APPENDIX

Material to Include in Submissions to Tribal Nations and SHPOs

- U.S. Geological Survey maps showing proposed wayside pole locations, as well as a Google Earth overlay with associated information regarding the height and foundation depth of each pole. The maps should show sufficient detail to provide the location of individual wayside poles as well as the spatial relationship among the wayside poles.
- Method of installation. If the method of installation will not be the same for every pole within a submission, the filing should distinguish which poles will use which method.
- A description of any other ground disturbance that may be associated with the installations, such as for equipment staging or the provision of power.
- Contact information for a responsible official at the railroad as well as a cultural resources professional.
- A cultural resources report that includes:
 - Information on Federal lands and Federally recognized Tribal lands along or under tracks;
 - Ownership of tracks on or near Federal lands, including direct ownership or lease arrangements;
 - Location and details on all listed or determined-eligible historic properties within the APE, as well as any historic properties and Tribal religious and cultural sites that have been identified by Tribal Nations;
 - Discussion of the known potential for below-ground cultural resources and historic properties, including background information on any predictive model used for analysis;
 - Results of any archeological or historical fieldwork undertaken;
 - A qualified professional's assessment of effects on historic properties and Tribal religious and cultural resources;
 - Photographs of historic properties within the APE and photographs looking at the proposed pole site from each historic property, as would be included in the FCC Form 620 or Form 621, when historic properties are present within the APE; and
 - Resumes of professional staff responsible for preparing the report sufficient to demonstrate that the report's authors and senior staff meet the relevant standards in *The Secretary of Interior's Professional Qualifications Standards* for their respective areas of responsibility.
- The applicant shall contact the SHPO either before or within seven days after E106 submission and Tribal cultural resource offices during the initial 20 days after TCNS submission about any need to supplement their filings.

ATTACHMENT B

Summary of the FCC Draft Program Comment for Positive Train Control (PTC)

- General
 - The Program Comment creates an optional alternative process to existing FCC Nationwide Programmatic Agreements (NPAs)
 - NPAs continue to apply to the extent Program Comment does not establish alternative procedures.

- Applicability
 - Eligible wayside structures must not:
 - Be taller than 75 feet (including antenna);
 - Create a foundation hole in excess of 15 inches in diameter (unless agreed to in the context of manual excavation);
 - Require a foundation deeper than 15 feet; or
 - Be situated outside the railroad right-of-way.
 - For all other cases, including collocations, Section 106 review will be conducted under existing FCC regulations and procedures.
 - Program Comment may be adopted by other Federal agencies to satisfy their obligations under Section 106.
 - Program Comment does not apply on Tribal lands unless a Tribal Nation elects to adopt its provisions and in so doing follows the process set forth in Section I.D of the FCC NPA.

- Exclusions from Section 106 Review
 - PTC wayside structures that are similar to nearby existing structures within the existing railroad right-of-way, provided the location is not within the boundaries of a known historic property (but subject to participation of Tribal Nations); and
 - Effects on the rails and the track beds themselves.

- Applicant submission package
 - Must use TCNS and E106 (where applicable)
 - May batch poles by county, subject to further FCC guidance
 - Batched submission requires map providing locations
 - Includes cultural resources report (*see Appendix for contents*)
 - Encouraged to consider including field survey and/or ethnographic survey where they are likely to be requested

- Area of Potential Effects (APE)
 - Presumed ¼-mile APE for visual effects, subject to adjustment where appropriate
 - Linear APE recommended

- Tribal Nations Review
 - Tribal Nations may request compensation for professional services consistent with ACHP guidance, including recovery of expenses to retain additional human resources as well as to monitor construction.
 - Applicant shall ask Tribal Nations whether additional information is needed within 20 days of submission.
 - If a Tribal Nation does not respond to the TCNS submission within 20 days, within which applicant has attempted at least one follow-up contact:
 - The applicant may ask the FCC to send a letter and/or e-mail to the Tribal Nation's designated cultural resources representative seeking a response.
 - The FCC will send this letter or e-mail within five business days.
 - If the Tribal Nation does not respond within 15 days of the FCC's contact and the FCC has attempted follow-up with the Tribal Nation, it will be deemed to have no interest in review of the proposed facility.
 - For those Tribal Nations that have notified the FCC that they may generally be considered uninterested in TCNS submissions if they do not respond within a specific time period of 30 days or less, without any need for follow-up contact, the usual process applicable to those Tribal Nations shall apply.
 - If a Tribal Nation requests additional information or materials:
 - The applicant and the Tribal Nation will attempt to resolve any disputes regarding the request within 15 days.
 - If the matter is not resolved within 15 days, the parties may bring their disagreement before the FCC.
 - If the Tribal Nation does not respond as to its interest within 20 days after receiving requested additional information or materials, the applicant may request that the FCC give the Tribal Nation a final opportunity to express its interest.
 - A Tribal Nation may request to monitor construction at any or all sites within a batched submission. The applicant shall honor such requests.
 - If a Tribal Nation identifies any site as needing further review or a closer examination for effects on a historic property or cultural resource, or any other issue arises that cannot be resolved swiftly by the parties, the Tribal Nation and the railroad are encouraged promptly to bring the matter to the attention of the FCC. The FCC on a priority basis will initiate dialogue among the parties, and consultation with the Tribal Nation as appropriate, in order to resolve the concern.
 - The FCC will resolve all such matters within 60 days of their being brought to its attention, unless the FCC determines that additional time is necessary. The FCC has full discretion to intervene in Section 106 review at any point in the process.

- SHPO Review
 - Applicant shall ask SHPO whether additional information is needed no later than seven days after submission.

- SHPO review should be completed within 30 days of submission pursuant to the procedures in the FCC NPA.
- Addressing Adverse Effects
 - Processes in the FCC NPA for avoidance, minimization, and mitigation continue to apply.
- Previously Constructed Facilities
 - The FCC will expeditiously establish a process to address PTC facilities that were constructed without Section 106 review, which will take into account Section 110(k) of the NHPA and be consistent with Section X of the FCC NPA.
 - This process will include provisions for appropriate mitigation, which the FCC will involve SHPOs and Tribal Nations in developing and implementing